Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-5077

ALEXANDER McLAUGHLIN,

Petitioner,

-v.-

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of North Carolina entered on April 14, 1975.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at __N.C.__, 213 S.E.2d 238 (1975), and is set out in Appendix A hereto, pp. 1a-10a, infra.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on April 14, 1975, and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTION PRESENTED

Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> §14-17 (repl. vol 1969): "Murder in the first and second degree defined; punishment.--A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison." 1/
>
> §14-18 (repl. vol. 1969): "Punishment for manslaughter.--If any person shall commit the crime of manslaughter he shall be punished by imprisonment in the county jail or State prison for not less than four months nor more than twenty years: Provided, however, that in cases of involuntary manslaughter, the punishment

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1/ As construed in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

shall be in the discretion of the court, and the defendant may be fined or imprisoned, or both."

§15-187 (repl.vol. 1975): "Death by administration of lethal gas.-- Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor."

§15-188 (repl. vol. 1975): "Manner and place of execution.-- The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article."

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of North Carolina, entered on April 14, 1975, affirming petitioner's convictions and sentences of death. Petitioner, Alexander McLaughlin, was given five death sentences by the Robeson County Superior Court on February 28, 1974, pursuant to convictions on five counts of first degree murder.[2/]

2/ Petitioner was convicted of the first degree murders of Carla Malloy (six years old), Mark Malloy (four years old), Jamar Jones (three years old), Checo Jones (two years old), and Tywana Jones (two years old). Petitioner is black, as were these five children.

(Judgment imposing a sixth death sentence upon one count of arson has subsequently been arrested by the North Carolina Supreme Court.)[3/]

3/ Petitioner's sentences of death were imposed under N.C. Gen. Stat. §14-17 (repl. vol. 1969)(murder) and §14-58 (repl. vol. 1969)(arson) as construed in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). The North Carolina Legislature subsequently enacted a statute, S.B. 157, Chap. 1201, 1973 Sess. (2nd Sess. 1974), effective April 8, 1974, which slightly altered the definition of first degree murder and which repealed the death penalty for arson. The new first degree murder statute, now codified as N.C. Gen. Stat. §14-17 (1974 supp.), provides:

> "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison."

The 1974 legislation, however, is not involved in this case. For the North Carolina Supreme Court has expressly held, with three Justices dissenting, that the enactment of that legislation did not affect death sentences imposed under the anterior State v. Waddell procedure. State v. Williams, __N.C.__, 212 S.E.2d 113, 119-120 (1975)(affirming a death sentence for rape). Subsequent to its Williams opinion, the court has affirmed death sentences imposed for first degree murders committed before April 8, 1974, with Chief Justice Sharp dissenting on the grounds expressed in her dissent in State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721, 747-750 (1974), and with Mr. Justice Copeland and Mr. Justice Exum dissenting on the grounds expressed in their dissents in State v. Williams, __N.C.__, 212 S.E.2d 113, 121-123 (1975). See, e.g., State v. Wetmore, N.C. Sup. Ct. No. 47 (Rowan County, Spring Term 1975)(June 6, 1975); State v. Young, N.C. Sup. Ct. No. 46 (Mecklenburg County, Spring Term 1975)(June 6, 1975).

All six capital charges arose out of a fire which destroyed a house in Maxton, North Carolina, during the early morning hours of Sunday, December 16, 1973. On that date, the house was occupied by Mrs. Lewbertha Jones and eleven young people, including Mrs. Jones' children, grandchildren, and a niece. R. 14, 23. Five of the young people were killed in the fire.

Mrs. Jones had been "going with" petitioner for four or five years and was his "girl friend." R. 49. She had a two-year-old daughter by him. Ibid. Petitioner had spent several nights in her house and had given Mrs. Jones "some money from time to time for support of some of her children." R. 51. On December 14, 1973, petitioner and Mrs. Jones had a violent argument at a local bar, "the Blue place." R. 24. Petitioner drew a pistol and Mrs. Jones knocked it to the floor with her hand; she then picked up a bottle and hit petitioner over the head with it. Ibid. Petitioner stated that "I suppose I was really made after Bertha Jones hit me." R. 47.

On the next night, a Saturday, Mrs. Jones left her seventeen-year-old daughter Tilisa in charge of the younger children while she visited a number of bars and restaurants in Maxton. Petitioner began drinking early that evening, first obtaining some liquor and beer from a bootlegger and then continuing to drink whiskey and beer at various night clubs. R. 47. Petitioner saw Mrs. Jones at Ziegler's Hotel and got into an argument with her, although he was later unable to recall what this argument was about. R. 49.

Sometime after midnight, he and Mrs. Jones met again in McRae's Place. He began to curse at her, push her, and pull at her clothes. She shoved him away and told him to leave her alone, but he returned and "began to curse . . . [her] and pull on . . . [her]." R. 18. Mrs. Jones testified that she "took the Coca-Cola bottle [she was drinking] and slapped him on the head with it. The bottle did not break. I finished drinking the soda." R. 19. She noticed "a little bit of blood on his face." R. 22. She declared "'I . . . [am] through with you,'" R. 22, and petitioner replied "'Bitch, I am going to burn your damn house and your mother fucking baby.'" R. 19. Two witnesses, sitting with Mrs. Jones, observed this scuffle and heard petitioner's threat. R. 25-26, 28-30.

Earlier in the evening, Tilisa Jones had briefly left the Jones house, but she returned about 11:00 p.m. and put the five youngest children to sleep. She put Tywana Jones (age two) and Carla Malloy (age six) into a bed in the bedroom containing the family television, and she put Checo Jones (age two) and Jamar Jones (age three) into a bed in another bedroom where Mark Malloy (age four) also slept in a separate bed. Tilisa and some of the older children watched television until the station went off the air, and then went to sleep. It was a cold, rainy night, R. 19, 31, and the house was cold because the fire in the wood-burning iron stove had gone out, R. 16. Sometime later that night, Tilisa was awakened by the shouts of her nine-year-old sister Demeatrice and found that the house was on fire: "I could see nothing but fire and smoke." R. 16. Tilisa escaped through

a window, returned to pull out Demeatrice, but could not return again because of the heat and because of the burns she had sustained. Ibid.

Ms. Daisy Blue was in McRae's Place Saturday evening. As she was leaving and preparing to get into her car at about 3:30 a.m., she observed petitioner "walking sort of speedy like" up to McRae's. R. 31. He declared, "'I set the damn house, Lewbertha's damn house on fire.'" Ibid. At this time, Ms. Blue noticed flames in the direction of Mrs. Jones' house, and drove there to find the house ablaze. She later noticed petitioner at the fire scene. Ibid.

Maxton policeman Kenneth Bullard also noticed the flames and drove to the fire. Shortly after arriving, he "noticed some kind of scramble back up the street" among the crowd that had gathered. R. 33.

> "There was a lot of cussing going on and I saw . . . [petitioner] running by me. When he got in front of me he stopped. He had been drinking some and there were some boys following him. . . . [Petitioner] stopped in front of my car. I could tell that he had been drinking by the way he stood. He was pretty close and I could smell it. I placed him under arrest for public drunkenness."

Ibid. This arrest was made because, as Officer Bullard testified, "I did not know what might happen to him if I let him go." R.34. 4/

4/ There was a great deal of somewhat contradictory testimony concerning petitioner's intoxication on the night of the fire. Mrs. Jones testified that she had known petitioner for three years "when he was both drunk and sober" and that he "acted like he had been drinking some" but "was not drunk." R. 19. One of the persons sitting at Mrs. Jones' table at McRae's testified that "I could not tell whether or not . . . [petitioner] had been drinking. He was not drunk," R. 26, and the other testified that she did "not know whether or not he acted drunk that night,"

As petitioner was sitting locked in a police car at the fire scene, a black woman walked up and signalled for Officer Bullard to roll down the window. When he did so, she accused petitioner of burning down the house. Petitioner replied, "Damn right I burned it down." R. 34. The burned bodies of Tywana Jones, Carla Malloy, Checo Jones, Jamar Jones, and Mark Malloy were later discovered in the ruins of the house.

Petitioner was questioned by the police about noon on December 16. He said that he had visited Mrs. Jones' house earlier that morning after his fight with her at McRae's Place, but he denied setting fire to the house. R. 47-48. After this questioning period was over, he told the officers, "'I burned the house,'" R. 59, and indicated he would talk to them later. That same day, about 6:00 p.m., he gave them a statement, which he subsequently signed confessing that he had set fire to the house by igniting a pile of paper or rags on the back porch. R. 50. He stayed there until he saw that the fire was burning. Ibid. He stated that "he did not think anything about the children in Lewbertha's house when he set the house on fire." Ibid.

Petitioner was indicted on five counts of first degree murder and one count of arson. His jury was instructed that it could

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4/ cont'd.

R. 29. In Ms. Blue's opinion, petitioner "had had a few drinks" but "was not drunk that night." R. 31. Petitioner did not testify at his trial but, in a statement introduced against him, he told the police on December 16 that he had been drinking all evening the previous day and "was so high he didn't know what was going on." R. 54.

find him guilty of first degree murder, R. 76, guilty of second degree murder, R. 77, guilty of voluntary manslaughter, ibid., or not guilty, R. 78, on the murder counts.[5] It found him guilty of five counts of first degree murder and also guilty of arson, and the trial court thereupon imposed six death sentences. R. 80-91. The Supreme Court of North Carolina arrested judgment on the arson count but, with three Justices dissenting in regard to the death penalty, affirmed petitioner's five convictions and death sentences on the first degree murder counts on April 14, 1975.[6]

5/ The jury was instructed that it could find petitioner guilty or not guilty of arson. R. 78.

6/ On April 23, 1975, Chief Justice Sharp stayed execution of petitioner's death sentences "pending further orders of this Court" to enable petitioner to file a petition for certiorari.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

After petitioner was sentenced, his counsel made a motion "to set the judgments aside as being cruel and unusual punishment and unconstitutional." R. 92. This motion was denied, and petitioner's Assignment of Error Number 16 contended that there was error in the "[f]ailure of the Trial Court to set the judgments aside as being cruel and unusual punishment and unconstitutional." R. 98. The North Carolina Supreme Court rejected this claim:

> "Defendant finally contends that his constitutional and statutory rights were violated by the imposition of the death penalty. The defendant's contentions with respect to the validity of the death sentence have been carefully considered and found to be without merit by this Court in a number of recent decisions. State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974); State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). No useful purpose would be served by further discussion here. This assignment is overruled."

State v. McLaughlin, __N.C.__, 213 S.E.2d 238, 247 (1975); App. A, infra, at 10a.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In order to avoid burdening the Court with lengthy and repetitious matter, petitioner adopts the "Reasons for Granting the Writ" section of the Petition for Writ of Certiorari to the Supreme Court of North Carolina, Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974), at 11-51 (attached as Appendix B, infra). On October 29, 1974, this Court granted certiorari to consider a similar question in Fowler v. North Carolina, No. 73-7031.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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Appendix A

State v. McLaughlin, __N.C.__,
213 S.E.2d 238 (1975).

STATE of North Carolina

v.

Alexander McLAUGHLIN.

No. 28.

Supreme Court of North Carolina.

April 14, 1975.

Defendant was convicted in the Superior Court, Robeson County, Clarence W. Hall, J., of arson and of first-degree murder, and he appealed. The Supreme Court, Moore, J., held that defendant was entitled to arrest of judgment in the arson case where the arson was an essential and indispensable element in the State's proof of murder committed in the perpetration of the felony of arson, so that arson charge afforded no basis for additional punishment, and that constitutional and statutory rights of defendant were not violated by imposition of the death penalty.

No error as to murder charge, judgment arrested as to arson charge.

Sharp, C. J., dissented and filed opinion.

Copeland, J., dissented and filed opinion.

Exum, J., dissented and filed opinion.

1. Homicide ⇐127

Bill of indictment drawn under statute relating to indictments for murder and manslaughter is sufficient to sustain verdicts of guilty of first-degree murder if jury finds from evidence and beyond a reasonable doubt that defendant killed deceased with malice, after premeditation and deliberation, or that he killed deceased in perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or other felony. G.S. § 15-144.

2. Indictment and Information ⇐121.2(5)

If defendant is charged with first-degree murder by bill of indictment drawn under statute relating to indictments for murder and manslaughter, and desires to know whether State relies on proof that the killing was done with premeditation or deliberation, or in perpetration of or in attempt to perpetrate a felony, defendant should apply for a bill of particulars, which would inform defendant of the specific occurrences intended to be investigated on the trial, and which would limit the course of the evidence to the particular scope of inquiry. G.S. §§ 15-143, 15-144.

3. Criminal Law ⇐1149
Indictment and Information ⇐121.1(3)

Granting or denial of motions for a bill of particulars is within court's discretion, and is not subject to review except for palpable and gross abuse thereof.

4. Indictment and Information ⇐121.2(5)

Overruling of defendant's motion for bill of particulars to require State to elect whether murders were done with premeditation and deliberation, or in perpetration or attempt to perpetrate arson, did not constitute an abuse of discretion, where arson indictment, inter alia, set forth address of house alleged to have been burned and the names of occupants therein, where murder indictment set forth, names of alleged victims, where defendant was familiar with house involved and its occupants, and where all information surrounding the commission of the crimes were contained in the bills of indictment and was well known to defendant. G.S. §§ 14-17, 15-144.

5. Homicide ⇐22(1)

"First degree murder" is the unlawful killing of a human being with malice and with premeditation and deliberation.

See publication Words and Phrases for other judicial constructions and definitions.

6. Homicide ⇐22(2)

Specific intent to kill is a necessary constituent of elements of premeditation and deliberation in a first-degree murder prosecution.

7. Homicide ⇐232

Premeditation and deliberation are usually not susceptible of direct proof, and are therefore susceptible of proof by circumstances from which facts sought to be proven may be inferred.

8. Homicide ⇐232

Jury in murder prosecution could find that defendant acted with premeditation and deliberation where several witnesses for State testified that prior to fire which killed five children defendant said he was going to burn house in which children were living, and where, after fire had been set, defendant stated that he had burned the house.

9. Homicide ⇐18(1)

Murder committed in a perpetration or an attempt to perpetrate arson is "first degree murder," irrespective of premeditation or deliberation, or malice aforethought. G.S. § 14-17.

10. Homicide ⇐268

Evidence in homicide prosecution was properly submitted to jury, over motions of defendant for nonsuit, where evidence showed that defendant announced to several witnesses his intention to burn house, that shortly after fire he told a witness that he had burned the house, and where defendant freely and fully confessed to police officers that he had burned the house.

11. Criminal Law ⇐53

Except where crime requires a showing of specific intent, voluntary intoxication is not a defense to a criminal charge.

12. Criminal Law ⇐53

Specific intent is not an element of the crime of arson, so that intoxication may not be shown to negative any elements of such crime.

13. Homicide ⇐28

Specific intent to kill is a necessary constituent of the elements of premeditation and deliberation as to charge of first-degree murder, and showing of legal intoxication to jury's satisfaction will mitigate the offense to second-degree murder.

14. Homicide ⇐294(2)

Defendant who was convicted of arson and of first-degree murder arising out of fire which killed five children was not entitled to an instruction on the law of intoxication, where evidence was insufficient to show that defendant's mind was so intoxicated and that his reason was so overthrown that defendant could not form a specific intent to kill. G.S. §§ 14-17, 15-144.

15. Criminal Law ⇐968(1)

Defendant who was convicted of arson and of first-degree murder in relation to setting of fire which killed five children was entitled to arrest of judgment in the arson case, where the arson was an essential and indispensable element in the State's proof of murder committed in the perpetration of the felony of arson, so that arson charge afforded no basis for additional punishment. G.S. §§ 14-17, 15-144.

16. Homicide ⇐354

Constitutional and statutory rights of defendant, who was convicted of first-degree murder arising out of fire which killed five children, were not violated by imposition of the death penalty.

Appeal by defendant under G.S. § 7A-27(a) from Hall, J., at the February 1974 Criminal Session of Robeson Superior Court.

Defendant was convicted of arson and of five counts of murder in the first degree. A sentence of death was imposed on the arson charge and on each of the five murder charges.

These charges arose from a fire that destroyed a house at 641 East Wilmington Street in Maxton, North Carolina, during the early morning of 16 December 1973, and killed five small children who were sleeping in the house at the time.

Tilisa Jones testified that she was seventeen years of age, and on Sunday, 16 December 1973, was living in the house on East Wilmington Street with her mother Lewbertha Jones and ten other children, ranging from two to fourteen years of age. Her mother left the house on Saturday night, 15 December 1973, leaving her in charge. After her mother left, Tilisa also left for a while, leaving her fourteen-year-old cousin Rosie in charge. When she returned at approximately 11:00 p. m., some of the younger children had fallen asleep. She put Tywana Yulette Jones, Carla Daneise Malloy, Checo Spectus Jones, Jamar Leonco Jones and Mark Teral Malloy to bed and at that time these children were all in good health. She and some of the older children watched television until after the late show and then went to bed. At that time the room was cold because the fire in the pot-bellied stove had gone out. Demeatrice, her nine-year-old sister, woke her later in the night telling her the house was on fire. Tilisa could see nothing but fire and smoke as she left the house through a window. She heard Demeatrice calling, and returned to the house and pulled her out of a window. She did not go back into the house as she had been burned. She did go next door and called the fire department. By that time this house was also on fire. Later she fainted. She did not see the five younger children again after she put them to bed.

Lewbertha Jones testified that on the date in question she lived in the house on East Wilmington Street with her children, grandchildren and niece, and that Carla Malloy, her daughter (six years of age), Mark Malloy, her son (four years of age), Jamar Jones, her grandson (three years of age), Checo Jones, her grandson (two years of age), and Tywana Jones, her daughter (two years of age), all died in the fire.

Lewbertha further testified that on 15 December 1973 she left home about 9:30 or 10:00 p. m. She stopped by Ziegler's Cafe for a pack of cigarettes. The defendant came in and she left and went to McRae's Place across the street. She was sitting at a table with Ada Pearl Monroe when defendant came in, walked up to the counter, and then came over to the table where she was sitting. Defendant began cursing her and pulling at her clothes. She told him to leave and went to the counter. Defendant followed so she returned to the table. The defendant continued pulling on her and cursing her. Finally, she hit him on the head with a coke bottle. Defendant then said, "Bitch, I am going to burn your damn house and your mother fucking baby," and walked out. After that she stayed and talked for a while. As she left to go home, she could see a fire in the direction of her house. When she got there the home was on fire. She then fainted.

On the night before the fire, defendant had drawn a pistol on her and she had knocked the pistol from his hand and hit him with a bottle.

Tony Wright, a friend of Lewbertha's, testified that he was present at McRae's Place on the night of 15 December 1973 and heard defendant curse Lewbertha and threaten to burn her home.

Ada Pearl Monroe testified that she was sitting with Lewbertha at McRae's Place on the night of 15 December 1973 and that defendant was pulling on Lewbertha's clothes, cursing her, and threatening to burn her home.

Daisy Blue testified that she was at McRae's Place and saw Lewbertha and defendant arguing but left before Lewbertha hit him with a bottle. She went to a house behind the store and talked and sang with friends. As she was getting in a car to leave around 3:30 a. m., defendant came up "walking sort of speedy like" and said, "I set the damn house, Lewbertha's damn house on fire." She hurried to Lewbertha's house and found it on fire.

Kenneth Bullard of the Maxton Police Department testified that he investigated the fire at Lewbertha's house on the morning of 16 December. When he arrived only

Lewbertha's house was burning. He helped a neighbor move objects from her house, but soon it and another adjacent house caught fire. Later, as all three houses were burning, he noticed a scramble up the street and "a lot of cussing going on." Defendant came running by and Bullard could smell alcohol. He did not know what might happen to defendant if he let him go, so he arrested him for public drunkenness. While defendant was in the police car, a woman came to the window and said defendant had "burned down the house." The defendant replied, "Damn right I burned it down."

Defendant was taken to the police station and locked up between 5:30 and 6:00 a. m.

Lawrence Jackson, Jr., testified that he is in the funeral business. He arrived at the site of the burned house around 9:00 a. m. on 16 December. Lewbertha's house was completely burned as were the houses on each side. He found the remains of five small human bodies in the ruins of Lewbertha's house.

Franklin D. Johnson, an agent for the State Bureau of Investigation, testified that after viewing the scene of the fire he went to the Maxton Police Department to talk to defendant. Defendant was taken by Deputy Sheriff Hubert Stone to the sheriff's office in Lumberton for questioning. There defendant was read his rights as required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and defendant stated he understood them. He then signed a waiver of these rights and answered questions from 12:20 p. m. until 1:30 p. m. Defendant admitted going to Lewbertha's house but denied setting it on fire. Defendant was questioned again around 6:30 p. m. He was again read his rights and another waiver was signed. Defendant then admitted that he had burned the house because he was mad at Lewbertha. Defendant said Lewbertha had once been his girl friend, that she had a child by him, and that he occasionally gave her money to help support the children. He also said he used rags and paper found on the back porch to set the house on fire.

Other testimony by Johnson served to corroborate the testimony of Lewbertha Jones, Tony Wright and Daisy Blue.

Deputy Sheriff Hubert Stone of the Robeson County Sheriff's Department testified in corroboration of Agent Johnson. He further testified that, after the first interrogation had ended about 1:30 p. m. on 16 December, defendant told him that he burned the house and asked him to come back later and he would tell the truth. Around 6:30 p. m. defendant confessed and signed a full statement.

Defendant did not testify or offer evidence.

Other facts pertinent to decision are set out in the opinion.

Atty. Gen. Robert Morgan, Deputy Atty. Gen. James F. Bullock, and Associate Attys. Austin B. Campbell, John R. Morgan and Ralf F. Haskell, Asst. Atty. Gen., Raleigh, for the State.

Fred L. Musselwhite, Lumberton, for defendant appellant.

MOORE, Justice.

The murder indictments in these cases were drawn under G.S. § 15-144. Defendant, before trial, filed a motion for a bill of particulars requiring the State to make an election as to whether the murders were done with premeditation and deliberation, or in the perpetration or attempt to perpetrate arson. Defendant contends it was error for the court to overrule this motion and to charge the jury that they could return a verdict of guilty of murder in the first degree if they found from the evidence beyond a reasonable doubt that the killings were done with malice and after premeditation and deliberation, or that the killings were done in the perpetration or attempt to perpetrate arson.

G.S. § 14-17 in part provides:

"A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death . . . ."

G.S. § 15-144 provides:

"In indictments for murder and manslaughter, it is not necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person accused, and the county of his residence, the date of the offense, the averment 'with force and arms,' and the county of the alleged commission of the offense, as is now usual, it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law; and it is sufficient in describing manslaughter to allege that the accused feloniously and willfully did kill and slay (naming the person killed), and concluding as aforesaid; and any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder or manslaughter, as the case may be."

[1] A bill of indictment drawn under G.S. § 15-144 is sufficient to sustain verdicts of guilty of murder in the first degree if the jury finds from the evidence and beyond a reasonable doubt that defendant killed the deceased with malice, after premeditation and deliberation, or that he killed the deceased in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or other felony. State v. Moore, 284 N.C. 485, 202 S.E.2d 169 (1974); State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Haynes, 276 N.C. 150, 171 S.E.2d 435 (1970).

[2] If a defendant is charged with murder in the first degree by a bill of indictment drawn under G.S. § 15-144 and desires to know whether the State relies on proof the killing was done with premeditation or deliberation, or in the perpetration or attempt to perpetrate a felony, he should apply for a bill of particulars as provided in G.S. § 15-143 (repealed by Session Laws of 1973, c. 1286, s. 26, effective July 1, 1975). State v. Haynes, *supra*.

The function of such a bill of particulars is (1) to inform the defense of the specific occurrences intended to be investigated on the trial and (2) to limit the course of the evidence to the particular scope of inquiry. State v. Cameron, 283 N.C. 191, 195 S.E.2d 481 (1973); State v. Spence, 271 N.C. 23, 155 S.E.2d 802 (1967); State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967).

[3] The granting or denial of motions for a bill of particulars is within the discretion of the court and is not subject to review except for palpable and gross abuse thereof. State v. Cameron, *supra*; State v. Spence, *supra*; State v. Porth, 269 N.C. 329, 153 S.E.2d 16 (1967).

The arson indictment in this case sets out the county in which the alleged offense occurred, the date of the occurrence, the street address of the house alleged to have been burned and the names of the occupants therein at the time.

[4] The murder indictments each give the date and the county where the offense was alleged to have occurred and the name of the alleged victim. The names of those alleged to have been murdered are the same as those alleged to have been occupants of the house when the fire was set. Defendant was familiar with the house involved and its occupants, having visited and slept there on occasions. All the information surrounding the commission of the crimes was contained in the bills of indictment and was well known to defendant. Furthermore, the solicitor announced that he would

[5a]

make out a case of premeditation and deliberation and would also make out a case of homicide in the perpetration of a felony, so defendant was on notice as to all elements of the charges against him and as to how the State planned to proceed. Under these circumstances, defendant has failed to show any abuse of discretion by the trial court in denying his motion for a bill of particulars.

[5-7] Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. A specific intent to kill is a necessary constituent of the elements of premeditation and deliberation in first degree murder. State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969). Premeditation and deliberation are not usually susceptible of direct proof and are therefore susceptible of proof by circumstances from which the facts sought to be proven may be inferred. As stated in State v. Walters, 275 N.C. 615, 624, 170 S.E.2d 484, 490 (1969):

"'Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: Want of provocation on the part of deceased. State v. Matheson, 225 N.C. 109, 111, 33 S.E.2d 590; State v. Hammonds, 216 N.C. 67, 75, 3 S.E.2d 439; State v. Buffkin, 209 N.C. 117, 126, 183 S.E. 543. The conduct of defendant before and after the killing. State v. Lamm, 232 N.C. 402, 406, 61 S.E.2d 188; State v. Chavis, 231 N.C. 307, 311, 56 S.E.2d 678; State v. Harris, 223 N.C. 697, 701, 28 S.E.2d 232. Threats and declarations of defendant before and during the course of the occurrence giving rise to the death of deceased. State v. Dockery, 238 N.C. 222, 224, 77 S.E.2d 664; State v. Hudson, 218 N.C. 219, 230, 10 S.E.2d 730; State v. Hawkins, 214 N.C. 326, 331, 199 S.E. 284; State v. Bowser, *supra* (214 N.C. 249, 199 S.E. 31). . . .'"

[8] In the present case, several witnesses for the State testified that prior to the fire defendant said he was going to burn Lewbertha's house and, in addition, Lewbertha testified that defendant said he was going to burn her house and her baby. After the fire was set defendant made the statement that he had "burned [the house] down." From this evidence, the jury could find that the defendant acted with premeditation and deliberation.

[9] Under G.S. § 14-17, a murder committed in the perpetration or attempt to perpetrate arson is murder in the first degree irrespective of premeditation or deliberation, or malice aforethought. State v. Hairston, 280 N.C. 220, 185 S.E.2d 633 (1972); State v. Thompson, *supra*.

We hold that the evidence in these cases was sufficient to permit the jury to find that defendant committed premeditated murder or murder in the perpetration or attempt to perpetrate arson. Therefore, the trial court did not err in submitting both to the jury.

By his next assignment of error defendant contends that the trial court erred in overruling the defendant's motion for nonsuit at the close of the State's evidence and at the close of all the evidence.

The evidence in the present case shows that defendant announced to several witnesses his intention to burn the house and that shortly after the fire he told Daisy Blue that he had "burned Lewbertha's damn house." He freely and fully confessed to police officers that he had burned the house. His statement closely paralleled the other evidence against him.

As we said in State v. McNeil, 280 N.C. 159, 161-62, 185 S.E.2d 156, 157 (1971):

". . . Motion to nonsuit requires the trial judge to consider the evidence in the light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom. State v. Vincent, 278 N.C. 63, 178 S.E.2d 608 (1971). 'Regardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been com-

mitted and that defendant committed it, the motion to nonsuit should be overruled.' State v. Goines, 273 N.C. 509, 160 S.E.2d 469 (1968)."

Accord, State v. Tillman, 269 N.C. 276, 152 S.E.2d 159 (1967); State v. Bogan, 266 N.C. 99, 145 S.E.2d 374 (1965).

[10] The evidence in this case clearly meets that standard and was properly submitted to the jury. This assignment is overruled.

Defendant next contends that the trial court erred in failing to instruct the jury on the law of intoxication as a defense, asserting that there was evidence from which the jury could have concluded that defendant was so intoxicated that he was incapable of forming criminal intent to commit the crimes of arson and murder in the first degree.

[11] Except where a crime requires a showing of specific intent, voluntary intoxication is not a defense to a criminal charge. State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973); State v. Propst, 274 N.C. 62, 161 S.E.2d 560 (1968); State v. Cureton, 218 N.C. 491, 11 S.E.2d 469 (1940); State v. Murphy, 157 N.C. 614, 72 S.E. 1075 (1911). *See, Annot.*, 8 A.L.R.3d 1236 (1966).

[12] Specific intent is not an element of the crime of arson. 5 Am.Jur.2d, Arson and Related Offenses § 10 (1962); 6 C.J.S. Arson § 3; State v. Thomas, 241 N.C. 337, 85 S.E.2d 300 (1955); State v. Cash, 234 N.C. 292, 67 S.E.2d 50 (1951); State v. Anderson, 228 N.C. 720, 47 S.E.2d 1 (1948). *See also*, Perkins on Criminal Law 217 (2d ed. 1969). Therefore, intoxication may not be shown to negative any elements of arson.

[13] However, specific intent to kill is a necessary constituent of the elements of premeditation and deliberation in first degree murder, and a showing of legal intoxication to the jury's satisfaction will mitigate the offense to murder in the second degree. State v. Bunn, *supra*; State v. Wilson, 280 N.C. 674, 187 S.E.2d 22 (1972); State v. Propst, *supra*; State v. Cureton, *supra*.

As stated by Justice Barnhill, later Chief Justice, in State v. Cureton, *supra*:

". . . No inference of the absence of deliberation and premeditation arises as a matter of law from intoxication; and mere intoxication cannot serve as an excuse for the offender. The influence of intoxication upon the question of existence of premeditation depends upon its degree and its effect upon the mind and passion. For it to constitute a defense it must appear that the defendant was not able, by reason of drunkenness, to think out beforehand what he intended to do and to weigh it and understand the nature and consequence of his act."

And, as we said in State v. Shelton, 164 N.C. 513, 79 S.E. 883 (1913):

"All the authorities agree that to make such defense available the evidence must show that *at the time of the killing* the prisoner's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill."

[14] In the absence of evidence of intoxication to a degree precluding the ability to form a specific intent to kill, the court is not required to charge the jury thereupon. State v. Cureton, *supra*. The question in this case is whether there was evidence that defendant was intoxicated to the extent that his ability to form such specific intent was overthrown, thus necessitating an instruction on intoxication by the trial judge. We think not.

There was ample evidence that defendant had been drinking on the night in question. Lewbertha Jones testified:

"I have known Alexander McLaughlin for about three years. I have had occasion to see him when he was both drunk and sober. I did not see him drinking that night. In my opinion, having known

him for some period of time I would say that he was not drunk, but acted like he had been drinking some. He acted like it. I don't know whether he had or not. . . . I did not see Alexander McLaughlin take a drop of liquor that night. He was acting like he was drinking. I did not get close enough to him to smell it on his breath."

Tony Wright testified:

"I observed McLaughlin closely at the McRae place. I could not tell whether or not he had been drinking. He was not drunk."

Daisy Blue testified:

"I have had occasions to see him when he has been both drunk and sober. In my opinion, Alexander McLaughlin was not drunk that night. 'He wasn't what you say drunk.' He had had a few drinks.

. . . . . .

"At approximately 3:30 o'clock, he was not acting any different in any way except walking fast. He did not seem to stagger. In my opinion I do not think he was drunk. He didn't act to be drunk, what you say drunk. . . . ."

Kenneth Bullard testified:

". . . . I noticed some kind of scramble back up the street, maybe as far as from her to the door. There was a lot of cussing going on and I saw Mr. McLaughlin running by me. When he got in front of me he stopped. He had been drinking some and there were some boys following him. McLaughlin stopped in front of my car. I could tell that he had been drinking by the way he stood. He was pretty close and I could smell it. I placed him under arrest for public drunkenness. He was not as drunk as some I have arrested for being drunk.

. . . . . .

"Q. (By Mr. Britt): Well, was he really drunk on this occasion?

. . . . . .

"THE WITNESS: *No, he wasn't really drunk.* (Emphasis added.)

. . . . . .

"I issued a warrant for the defendant's arrest for public drunkenness. I arrested the defendant for public drunkenness. I did not know what might happen to him if I let him go . . . ."

Franklin Johnson testified that defendant stated:

". . . . [H]e had been drinking since he had gotten into Maxton and was drinking beer and whiskey. . . . ."

Hubert Stone testified that defendant stated to him:

"I had been drinking beer and some whiskey. Later on we began to argue at each other. We separated and later we both got together at William McRae's Place, just off Highway 74, near the hotel. We started arguing again there. It was about 2:00 or 3:00 o'clock. During the argument Lewbertha Jones hit me in the head with a bottle. When she hit me, there was a crowd of people in there. It made me mad. I then told her that I would burn her house. I then got out, went outside of the building and went to Lewbertha's house across the railroad walking. When I got to the house I saw the front porch light burning, a light in her bedroom burning. I believe the light on the back porch was burning. I went around the house to the back porch. I took my matches out of my pocket and light [sic] some rags and paper that was there on the back porch. I then saw it was burning and left and went back to Willie's Place where I had left Lewbertha."

None of the foregoing is evidence that defendant's mind was so intoxicated and his reason so overthrown that defendant could not form a specific intent to kill. At no time did defendant say he was so drunk he didn't know what he was doing. To the contrary, he recited in detail his actions on this occasion.

Defendant contends, however, that State v. Propst, *supra*, is authority for his position that the trial judge was required to instruct

on intoxication in this case. In *Propst*, however, defendant had been medically diagnosed as paranoid, had previously been medically determined to be unable to understand the charges against him, and had been committed to Dorothea Dix Hospital for treatment. Further, defendant in that case had drunk an entire fifth of whiskey shortly before the murder, "had really been tore up with a bad case of the nerves the past several days," "had been complaining with his head," had delusions about being persecuted, and, according to expert testimony, had lost contact with reality.

We find no such evidence of defendant's inability to form a specific intent to kill in this case.

This assignment is overruled.

Defendant next assigns as error the court's failure to arrest judgment in the arson charge in that the arson charge was embraced and made a part of the five charges of murder in the first degree. We believe there is merit to this contention.

In State v. Moore, *supra*, the indictment, drawn under G.S. § 15-144, charged defendant with killing with malice, premeditation and deliberation. Defendant was also charged with armed robbery. The evidence against him on the murder charge disclosed a killing in the perpetration of robbery. The trial court had charged that a verdict of first degree murder could be rendered upon a finding beyond a reasonable doubt that the killing was done in the perpetration or attempt to perpetrate a robbery. The jury found the defendant guilty of both murder and armed robbery. On appeal, this Court vacated the armed robbery conviction on the basis that it had been merged into the murder conviction.

In State v. Thompson, *supra*, 280 N.C. at 215-16, 185 S.E.2d at 675, involving convictions for felonious breaking and first degree murder, Chief Justice Bobbitt formulated the following succinct statement of the merger rule:

". . . [T]he separate judgment imposing punishment for felonious breaking and entering in addition to that imposed for the murder conviction cannot stand. When a person is convicted of murder in the first degree no separate punishment may be imposed for any lesser included offense. Technically, feloniously breaking and entering a dwelling is never a lesser included offense of the crime of murder. *However, in the present and similar factual situations, a cognate principle applies.* Here, proof that defendant feloniously broke into and entered the dwelling . . . was an essential and indispensable element in the State's proof of murder committed in the perpetration of the felony of feloniously breaking into and entering that particular dwelling. The conviction of defendant for felony-murder, that is, murder in the first degree without proof of malice, premeditation or deliberation, was based on a finding by the jury that the murder was committed in the perpetration of the felonious breaking and entering. *In this sense, the felonious breaking and entering was a lesser included offense of the felony-murder.* Hence, the separate verdict of guilty of felonious breaking and entering affords no basis for additional punishment. If defendant had been acquitted in a prior trial of the separate charge of feloniously breaking and entering, a plea of former jeopardy would have precluded subsequent prosecution on the theory of felony-murder. State v. Bell, 205 N.C. 225, 171 S.E. 50 (1933)." (Emphasis added.)

See also, State v. Carroll, 282 N.C. 326, 193 S.E.2d 85 (1972); State v. Peele, 281 N.C. 253, 188 S.E.2d 326 (1972).

[15] The trial judge in the present case charged the jury to return a verdict of guilty of murder in the first degree if the State satisfied them beyond a reasonable doubt that the killings were done with premeditation and deliberation or in the perpetration or attempted perpetration of the felony of arson. We do not know, of course, which of the two theories the jury chose in finding defendant guilty of murder

in the first degree. Undoubtedly, however, the jury considered the overwhelming evidence that the murders were committed in the perpetration of arson. Accordingly, since the arson was an essential and indispensable element in the State's proof of murder committed in the perpetration of the felony of arson, it affords no basis for additional punishment. This assignment is sustained, and the judgment in the arson case is arrested.

Since we arrest judgment in the arson case, it is not necessary to determine whether the 1973 amendment to G.S. § 14-58, changing the punishment for arson from death to life imprisonment, applies to this case.

[16] Defendant finally contends that his constitutional and statutory rights were violated by the imposition of the death penalty. The defendant's contentions with respect to the validity of the death sentence have been carefully considered and found to be without merit by this Court in a number of recent decisions. State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974); State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). No useful purpose would be served by further discussion here. This assignment is overruled.

In view of the seriousness of the charge and gravity of the punishment imposed, we have carefully examined each of defendant's assignments of error. In the trial, verdicts and judgments, we find no errors except in the judgment in the arson case which we vacate.

As to the murder charges: No error.

As to the arson charge: Judgment arrested.

SHARP, Chief Justice (dissenting as to the death penalty).

The murders for which defendant was convicted occurred on 16 December 1973, a date between 18 January 1973, the day of the decision in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19, and 8 April 1974, the day on which the General Assembly rewrote G.S. § 14-17 by the enactment of Chapter 1201 of the Session Laws of 1973. For the reasons stated by Chief Justice Bobbitt in his dissenting opinion in State v. Jarrette, 284 N.C. 625, 666, 202 S.E.2d 721, 747 (1974) —an opinion in which Justice Higgins and I joined—I dissent as to the death sentence imposed upon defendant by the court below and vote to remand for the imposition of a sentence of life imprisonment. *See also* the dissenting opinion of Chief Justice Bobbitt, and my concurrence therein, in State v. Waddell, supra, 282 N.C. at 453 and 476, 194 S.E.2d at 30 and 47.

COPELAND, Justice dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in State v. Williams, 286 N.C. 422, 212 S.E.2d 113.

EXUM, Justice dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975), other than those relating to the effect of Section 8 of Chapter 1201 of the 1973 Session Laws.

WEST KEYNUMBER SYSTEM

STATE of North Carolina

v.

Frank James SILVER.

No. 35.

Supreme Court of North Carolina.

April 14, 1975.

Defendant was convicted in the Superior Court, Nash County, Robert D. Rouse,

Appendix B

Pp. 11-51, Petition for Writ of Certiorari to the Supreme Court of North Carolina, Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This case and four contemporary cases[6/] present the question of the constitutionality of the death penalty as that penalty was resurrected in the State of North Carolina by a four-to-three vote of the North Carolina Supreme Court following Furman v. Georgia, 408 U.S. 238 (1972). A brief review of post-Furman developments relating to the death penalty in the United States generally and in North Carolina particularly sets the question in perspective.

The nearly universal response of state courts in obedience to Furman was to hold that death sentences could no longer be meted out under the capital punishment laws which had been in effect prior to June 29, 1972, and which the Furman decision

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6 / Crowder v. North Carolina, O.T. 1973, No. 73-
Henderson v. North Carolina, O.T. 1973, No. 73-
Jarrette v. North Carolina, O.T. 1973, No. 73-
Noell v. North Carolina, O. T. 1973, No. 73-

of that date declared unconstitutional.[7] Subsequently, statutes

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7/ See, e.g., United States v. Lee, 489 F.2d 1242 (CA DC 1972); United States v. Woods, 484 F.2d 127, 138 (CA4 1973) ("Since the decision in Furman v. Georgia, ... the statute under which defendant was convicted of first degree murder, 18 U.S.C. §111, provides as the only possible sentence imprisonment for life" at 138); United States v. McNally, 485 F.2d 398 (CA8 1973); Hubbard v. State, 290 Ala. 118, 274 So.2d 293 (1973) ("There is no question that Furman has, as of now, eliminated the death penalty from our statute. The elimination of the death penalty does not destroy the entire statute. The only sentence which can now be imposed upon conviction of the crime of murder in the first degree is life imprisonment." 274 So.2d at 300); State v. Endreson, 109 Ariz. 117, 506 P.2d 248 (1973) ("In view of [the Furman ruling] we hold that the death penalty provisions of [the Arizona murder statute] are unconstitutional." 506 P.2d at 254); O'Neal v. State, 253 Ark. 574, 487 S.W. 2d 618 (1972); People v. Murphy, 8 Cal. 3d 369, 105 Cal. Rptr. 138, 503 P.2d 594 (1972); State v. Aillon, ___ Conn. ___, 295 A.2d 666 (1972); Anderson, et al., v. State, 267 So. 2d 8 (Fla. 1972); Sullivan et al. v. State, 229 Ga. 731, 194 S.E. 2d 411 (1972); People v. Speck, 52 Ill. 2d 284, 287 N.E. 2d 609 (1972) ("The Supreme Court of the United States has now held that a defendant could not be validly sentenced to death under [pre-Furman Illinois capital statutes]." 287 N.E.2d at 700; Adams v. State, ___ Ind. ___, 284 N.E.2d 757 (1972); State v. Randol, 212 Kan. 461, 513 P.2d 248 (1973) (". . .court is of the opinion that the death penalty provision of our present statute is constitutionally impermissible. The 1972 Legislature of Kansas considered but failed to enact amendatory legislation." 513 P.2d at 256); Caine and McIntosh v. Commonwealth, 491 S.W.2d 824 (Ky. 1973), cert. den. 414 U.S. 876; State v. Flood, 263 La. 700, 269 So.2d 212 (1972) ("the Furman case has eliminated 'capital offenses' in Louisiana." 269 So.2d at 214); Bartholmey v. State, 267 Md. 175, 297 A.2d 696 (1972); Commonwealth v. LeBlanc, ___ Mass. ___, 299 N.E.2d 719 (1973); Capler v. State, ___ Miss. ___, 268 So. 2d 338 (1972) (". . . the harsher penalty of death may not be lawfully imposed. The remaining part of the statute is complete. . . .We hold that because of Furman v. Georgia, the death penalty cannot be inflicted, that the remainder of the statute is valid and the only other punishment for murder is life imprisonment." 268 So.2d at 339-40); State v. Scott, 491 S.W.2d 514 (Mo. 1973) ("The sole and only punishment for first degree murder in this state is now life imprisonment." at 521); State v. Alvarez, No. 27435, Dist. Ct. Lancaster Cty., Neb. Oct. 4, 1972; Walker v. State, 88 Nev. 539, 501 P.2d 651 (1972); State v. Martineau and Nelson, 112 N.H. 278, 293 A.2d 766 (1972); People v. Fitzpatrick, 32 N.Y. 2d 499, 300 N.E. 2d 139 (1973), cert. den. 38 L.Ed. 2d 338, 94 S.C. 554 (1973); State v. Johnson, 31 Ohio St. 2d 106, 285 N.E.2d 751 (1972) ("Under [the Furman] holding, which we are required to follow, the infliction of the death penalty under the existing law of Ohio is now unconstitutional [with possible exceptions not relevant here]." 285 N.E. 2d at 755); Pate v. State, 507 P.2d 915 (Okla. 1973) ("After an exhaustive study of the [Furman] opinions . . . this court reluctantly finds that it is impermissible, under said decisions, to impose a sentence of death on any convicted person until such time as

were enacted in slightly more than half the States (and by the federal government), authorizing the use of the punishment of death in differingly defined categories of cases.[8] The statutes vary widely in their terms and forms, and consequently vary

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the laws have been duly enacted conforming to the standards set forth in Furman v. Georgia," at 916); Commonwealth v. Bradley, 449 Pa. 19; 295 A.2d 842 (1972); Hunter, et al. v. State, ___ Tenn. ___, 496 S.W.2d 900 (1972) ("The effect of [Furman] . . . is to render void the penalty of death as it exists under the statutes of Tennessee." 496 S.W.2d at 902); Lopez v. State, 500 S.W.2d 844 (Tex. Crim. 1973) (". . . we find the inescapable conclusion to be that the holding in Furman and Branch rendered it impermissible under the Constitution of the United States to impose the death penalty under our ten existing statutes." At 846); Wood v. Commonwealth, 213 Va. 346, 192 S.E.2d 808 (1972); State v. Vidal, 82 Wash.2d 94, 508 P.2d 158 (1973) ("The recent case of Furman v. Georgia . . . has the effect of preventing the imposition of the death penalty under the existing statutes of the State of Washington." 508 P.2d at 162).

8/ Some of these new statutes provide that a court or jury must make a separate determination as to whether a defendant should be sentenced to life or death independently of its finding the defendant guilty of a capital crime; conviction of a particular offense does not, therefore, necessarily result in a death sentence. Some of these laws provide a single verdict proceeding, in which the trial judge or jury must return a general verdict finding a defendant guilty of a capital degree of the offense. Del. Code, tit. 11, § 636 (1974), as amended by Del. H.B. No. 429, 127th Gen. Ass. (1974); N.H. Rev. Stat. Ann. § 630:1(I) (1973), as amended by N.H. S.B. 27, Chap. 34, Acts of 1974, N.H. Gen. Ct.; N.Mex. Stat. §§ 40A-2-1, 40A-2-1(A), 40A-29-2 (1974); N.C. Gen. Stat. §§ 14-17, 14-21, as amended by S.B. 157, Chap. 1201, 1973 Sess. Laws (2nd Sess. 1974); Tenn. Code Ann. §§ 39-2402 (as amended by Pub. Chap. 462, Tenn. Laws 1974), 39-3702 (as amended by Pub. Chap. 461, Tenn. Laws 1974) (1974). Others of these statutes provide a unitary proceeding where a jury must return a verdict finding special facts to justify the death sentence. Ind. Code § 10-3401 (1974); Ky. Rev. Stat. Chap. 507, as amended by Ky. H.B. No. 232, Reg. Sess. 1974; La. Rev. Stat. §§ 14:30, 14:42, 14:44, 14:113 (1974); La. Code

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somewhat in the questions they present regarding their compliance with Furman and with the Eighth and Fourteenth Amendments to

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8/ cont'd

Crim. Proc., Art. 557, 598, 817 (1974); Miss. Code §§ 97-3-19, 97-3-65 (1974), as amended by Miss. S.B. No. 2341, Reg. Sess. 1974; Mont. Code §§ 94-5-102, 94-5-103, 94-5-105, 94-5-304 (as amended by Mont. H.B. No. 643, Mont. Gen. Laws 1974) (1974); Nev. Code § 200.030 (1974); Okla. Stat., tit. 21, §§ 701.1, 701.3, 701.6 (1974); Wyo. Stat. § 6-54 (1974). Among the new laws which provide a bifurcated proceeding to make this separate determination as to sentence, some allow imposition of sentence without any particular finding identified by the legislature as a prerequisite for imposing either a sentence of death or life imprisonment. Ga. Code § 27-2534.1 (1973), as amended by No. 74, Ga. 1973 Sess. Laws at 162-172; Utah Crim. Code §§ 76-3-206, 76-5-202, 76-5-302, 76-3-207 (1974). Others of these bifurcated trial statutes require the imposition of a death sentence when a certain finding is made at the sentencing proceeding; some identify a particular circumstance which justifies imposition of a death sentence. Cal. Penal Code §§ 190, 190.1, 190.2, 209, 219, 4500 (1974); Ill. Code §§ 5-8-1a, 9-1 (1974); Tex. Pen. Code § 19.02 (1974); Tex. Code Crim. Proc., Art. 37.071 (1974); others identify such circumstances but provide that such "aggravating" circumstances may be counterbalanced by the finding of "mitigating" circumstances in some unspecified fashion, Ariz. Rev. Stat. §§ 13-452 - 13-454 (1974; Ark. Code §§ 41-4702 - 41-4713 Fla. Stat. §§ 782.01, 794.01, 792.141 (1974); Neb. Code §§ 28-401, 29-2522, 29-2523, 29-2524 (1974); still others provide formulae for the weighting of "aggravating" against "mitigating" circumstances to determine which defendants shall be sentenced to death. Conn. Gen. Stat. § 53a-45 (1974); Ohio Rev. Code §§ 2929.03, 2929.04 (1974); Pa. Stat., tit. 18, § 4701 (1974), as amended by Pa. H.B. 1060, Act. 46, 1974 Sess.

Another group of statutes provides for the imposition of a death sentence by operation of law pursuant to a jury's or trial judge's conviction of a certain crime. Idaho Code §§ 18-4003, 18-4004 (1974); R.I. Code § 11-23-2 (1974); New York: Ass. Bill 11474, 1974 Sess. Laws.

The following States have not enacted legislation authorizing the death penalty since Furman: Alaska, Alabama, Colorado, Hawaii, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, North Dakota, Oregon, South Carolina, South Dakota, Virginia, Washington, West Virginia, Wisconsin, Vermont.

the Constitution.[9] It is a fair although gross generalization that, in most States, the new statutes authorize capital punishment for a narrower category of offenses than those that were punishable by death in the same States before Furman. Of the 103 men and women who have been sentenced to die in the United States since June 29, 1972, and who are presently on death row,[10] roughly two-thirds were condemned under the new post-Furman statutes.

Virtually all of the remainder[11] -- 31 men and women, to be

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9/ The first decisions by the highest court of any State affirming death sentences imposed under one of the new post-Furman statutes were handed down in a Georgia murder case, State v. House, Ga. Sup. Ct. No. 28678 (April 4, 1974) (rehearing denied, April 25, 1974); and in a Georgia rape case, State v. Eberheart, Ga. Sup. Ct. No. 28776 (April 30, 1974) (rehearing denied, May 21, 1974). Counsel for Mr. House and Mr. Eberheart (who include some of the counsel for petitioner Dillard) are presently preparing to seek review by this Court of the Georgia Supreme Court's decisions.

10/ We exclude from this computation a number of persons sentenced to death since Furman whose convictions or death sentences have been reversed or vacated on appeal. The 99 figure represents persons presently committed under unreversed and unvacated sentences of death.

11/ Seven persons have been sentenced to die since Furman under the provisions of pre-Furman statutes. The cases of six of these persons (in Massachusetts, Montana, Pennsylvania, and South Carolina) are described in note 14, infra. The remaining case arises under a Virginia statute which the Virginia Supreme Court held distinguishable from the statutes invalidated in Furman. State v. Jefferson, Va. S.C., No. 730370, decided April 22, 1974. A petition for rehearing is presently pending in Jefferson. Should it be denied, counsel for Mr. Jefferson (who are associated with some of the counsel for petitioner Dillard) anticipate that review will be sought in this Court.

exact -- are on death row in North Carolina, where post-Furman developments took a markedly different turn by the margin of a single vote on the North Carolina Supreme Court in the case of State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). Prior to 1947, North Carolina law had required the imposition of the death penalty upon all convictions for the crimes of first-degree murder, rape, first degree burglary, and arson. By enactments of 1947 and 1949, the North Carolina General Assembly provided that, in the case of convictions for any of these four offenses, the jury might spare the defendant's life by a recommendation of life imprisonment. 12/ An unanimous Supreme Court of North Carolina

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12/ The jury was given the power to recommend life imprisonment in arson and burglary cases in 1947, and in murder and rape cases in 1949. We have found no legislative history dealing directly with the 1947 enactment.

The limited legislative history available for the 1949 North Carolina legislative action reflects a clear and considered abandonment of a general mandatory death penalty. As noted in State v. Pugh, 250 N.C. 278, 168 S.E.2d 649, 642 (concurring opinion of Denny, J.), the 1947 General Assembly created a Special Commission for the Improvement of the Administration of Justice. That Commission recommended, inter alia:

> "We propose that a recommendation of mercy by the jury in capital cases automatically carry with it a life sentence. Only three other states now have the mandatory death penalty and we believe its retention will be definitely harmful. Quite frequently, juries refuse to convict for rape or first degree murder, because, from all the circumstances, they do not believe the defendant, although guilty, should suffer death. The result is that verdicts are returned hardly in harmony with evidence. Our proposal is already in effect in respect to the crimes of burglary and arson. There is much testimony that it has proved beneficial in such cases. We think the law can now be broadened to include all capital crimes."

[footnote continued]

concluded in Waddell that, as amended in 1947 and 1949 and operative for nearly a quarter-century between 1949 and 1972, the North Carolina statutes inflicting capital punishment for first degree murder, rape, first degree burglary and arson were unconstitutional under Furman. Three Justices of the court therefore would have held that the death penalties provided by North Carolina law on the dates of the Furman and Waddell decisions were constitutionally unenforceable then and thenceforth until (at the least) the enactment of new capital punishment legislation by the General Assembly. But a majority of four Justices

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12/ cont'd.

POPULAR GOVERNMENT (January 1949) (published by the Institute of Government, University of North Carolina, Chapel Hill, North Carolina), p. 13. The North Carolina Supreme Court commented on the legislative intent indicated by the 1949 measures in State v. McMillan, 233 N.C. 630, 65 S.E.2d 212, 213 (1951).

> "The language of this amendment stands in bold relief. It is plain and free from ambiguity and expresses a single, definite and sensible meaning, - a meaning which under the settled law of this State is conclusively presumed to be the one intended by the Legislature.
>
> "It is patent that the sole purpose of the act is to give to the jury in all cases where a verdict of guilty of murder in the first degree shall have been reached, the right to recommend that the punishment for the crime shall be imprisonment for life in the State's prison . . . . No conditions are attached to, and no qualifications or limitations are imposed upon, the right of the jury to so recommend. It is an unbridled discretionary right. And it is incumbent upon the court to so instruct the jury. In this, the defendant has a substantive right."

held that the only portion of North Carolina law invalidated by Furman was the 1949 "recommendation" provision, with the result that (prospectively from the January 18, 1973, date of the Waddell decision) North Carolina law reverted to its pre-1949 state:

> "[T]he effect of the Furman decision upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death." (State v. Waddell, 282 N.C. 431, 194 S.E.2d 19, 28-29(1973).)

Under these procedures, petitioner and the other 30 persons now inhabiting North Carolina's death row were sentenced to die between the date of Waddell and the date of the enactment of a new North Carolina death penalty statute on April 8, 1974. 13/

The question presented here is the federal constitutionality of death sentences imposed in North Carolina pursuant to the Waddell procedures and without new legislative authorization after Furman. Most immediately, that question is potentially decisive of the lives of the 31 condemned inmates in the State

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13/ See note 2, supra.

which now has the largest death row population in the Nation. It may also have direct implications for death sentencing in four other States.[14/] Depending, of course, upon the grounds on which this Court elects to consider the question, it may or it may not have implications -- of narrower or broader scope -- for the death penalties enacted by post-Furman legislation.

14/ The only other state appellate court that has dealt with Furman in the fashion of Waddell is the Supreme Court of Delaware, in State v. Dickerson, __ Del. __, 298 A.2d 761 (1972). The Dickerson opinion was announced prospectively on November 1, 1972. No capital convictions were returned in the State of Delaware between that date and the dates upon which, successively, (1) a new criminal code enacted before Furman but effective July 1, 1973, came into effect, repealing the statutory provisions upon which Dickerson rested, and (2) the Delaware legislature enacted a post-Furman statute effective March 29, 1974. There is presently pending litigation in the Delaware Supreme Court raising the issues of the effects upon Dickerson of the supervening code and post-Furman enactment. State v. Smith, Del. S.C. No. 52,1974.

Trial courts in Massachusetts and South Carolina have imposed death penalties after Furman under the purported authorization of pre-Furman statutes and in apparent reliance upon the rationale of Waddell and Dickerson. Commonwealth v. Brown, Clinkscales, and Johnson, Superior Ct., Suffolk Co. (Mass.), Nos. 74502-3-4 and 74516-17-18; State v. Speights, Ct. of Gen. Sess., Florence Co. (S.C.), No. 5053. It is also possible that three post-Furman death sentences imposed in Montana and Pennsylvania under pre-Furman legislation rest upon the same rationale, although the trial judges' reasoning in these cases more likely stands upon other grounds. State v. Rhodes & Shields, Mont. S. Ct. Nos. 12596 and 12597; Commonwealth v. Martin, Pa. Sup. Ct., No. 44 (March Term, 1974). All of the cases just mentioned are presently pending in the respective Supreme Courts of the States in which they arise.

A. Evasion of the Furman Decision

The narrowest issue raised is simply whether the majority of the North Carolina Supreme Court in Waddell read Furman correctly and applied Furman permissibly in holding that Furman invalidated only the 1949 "recommendation" provision of North Carolina law, rather than the underlying death penalty. As tortured as that holding may seem -- being the lethal equivalent of a state-court holding that Brown v. Board of Education required the closing of the public schools instead of their desegregation -- it is not entirely unprecedented. Twice in recent years this Court has corrected similar manipulations of state-law severability doctrines designed to emasculate a constitutional decision of the Court forbidding the imposition and carrying out of impermissible death sentences. Funicello v. New Jersey, 403 U.S. 948 (1971)(alternative ground); Thomas v. Leeke, 403 U.S. 948 (1971).

These two cases involved provisions of New Jersey and South Carolina law which allowed capitally-charged defendants to avoid the possibility of a death sentence by pleading non vult (in New Jersey) or guilty (in South Carolina), and thus affronted the rulings in United States v. Jackson, 390 U.S. 570 (1968), and Pope v. United States, 392 U.S. 651 (1968). The South Carolina Supreme Court in Thomas recognized the incompatibility of its statutory guilty-plea scheme with the constitutional principle of Jackson, but held that the result was to invalidate and sever the guilty-plea provision, leaving the death penalty standing. The New Jersey Supreme

Court attempted to distinguish Jackson but held alternatively that, if Jackson did invalidate New Jersey's non vult provision, that provision rather than the death penalty would be rendered inoperative. In both cases, then, the state-court reaction to decisions of this Court invalidating a composite statutory death-sentencing procedure under which unknown numbers of capital defendants had escaped the death penalty while others had unconstitutionally been sentenced (and many sent) to their deaths, was to sever the escape clause, treat it as though it had never existed for constitutional as well as state-law purposes, and condemn those denied its benefits to die. In both cases, this Court declined the gambit.

What a majority of the North Carolina Supreme Court has done here, albeit by a somewhat different mechanism, is much the same thing. During a quarter of a century between enactment of the legislative "recommendation" procedure in 1949 and enactment of a new post-Furman death-sentencing procedure by the North Carolina legislature in 1974, countless men died and others guilty of identical crimes were spared death pursuant to an arbitrary selective procedure which -- as the North Carolina Supreme Court itself has concluded -- falls unmistakably within the ban of Furman. The response of four Justices of that court is to say essentially that, because the persons spared should not have been spared (under an appropriate manipulation of state severability theory), the fact that they were spared is to be disregarded in determining whether the continued application of the pre-Furman North Carolina statutes authorizing capital

punishment would be arbitrary and selective, and hence a constitutionally cruel and unusual punishment, in the wake of Furman. Thirty-one more persons are thus tossed into the death column as opposed to the now closed and hence forgotten column of the spared, upon the capital punishment ledgers of North Carolina since 1949. Whether the particular state-law contrivance by which that calculation is accomplished makes the deaths of these 31 persons any less selective, arbitrary, cruel and unusual in federal constitutional contemplation is, we suggest, an issue that this Court should address, if its Furman decision is to have the vitality and respect that the Supremacy Clause rightly commands.

B. The Lawless Imposition Of Death Penalties

The second issue presented is whether the re-institution of the death penalty which the North Carolina Supreme Court achieved by amputating life from that State's life-or-death sentencing statutes is a result that can constitutionally be effected by any device of judicial decision wholly ungoverned and undirected by legislative action. It is, of course, generally true that the federal Constitution is not concerned with how a State divides it law-making functions between its judicial and legislative organs. But that generalization cannot be permitted to sweep away the fundamental concerns of the Eighth and Fourteenth Amendments against judicial imposition of harsh criminal punishments unauthorized by law and in excess of the penalties provided by "the valid laws of the land." Giaccio v. Pennsylvania, 382 U. S. 399, 403 (1966).

Recent scholarship has underscored that the English Bill of Rights, from which the Eighth Amendment's prohibition of "cruel and unusual punishments" was derived, was in large measure directed toward preventing the exaction of unauthorized penalties. 15/ That

15/ Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 CAL. L. REV. 839, 845-847, 852-860 (1969). It is true that Granucci also finds that the American Framers imperfectly understood the English background of the cruel-and-unusual-punishment clause, and that they themselves were principally concerned with the problem of intrinsically barbaric penalties. But this does not support a conclusion that the Framers meant to diminish the scope of a guarantee that they believed basic to their traditions (see 3 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447 (1863)), or to reject protections of the citizen long preserved by their English heritage. Indeed, as early as 1635, American settlers had "conceived great danger . . . in regard that . . . magistrates, for want of positive laws, in many cases, might proceed according to their discretions," and had therefore agreed "that some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Charta, which being allowed by some of the ministers and the general court, should be received for fundamental laws." WHITMORE, COLONIAL LAWS OF MASSACHUSETTS 1630-1686, at 5 (1889). It should hardly be surprising that the cruel-and-unusual-punishment clause, like many of the other basic guarantees of the Bill of Rights, is woven of several strands and protects against more than a single evil.

function remains a vital office of the cruel-and-unusual punishment clause today,[16] although it certainly is not the exclusive focus of the clause.[17] As this Court pointed out in Weems v. United States, 217 U. S. 349, 376 (1909), the Framers were eager to assure "that government by the people, instituted by the Constitution, would not imitate the conduct of arbitrary monarchs." The conjunction of the words "cruel" and "unusual" in the Eighth Amendment can hardly be regarded as accidental if one appreciates the relationship, within a basically popular and democratic governmental structure, of the dangers of lawlessness, irregularity, arbitrary selectivity,[18] and cruelty.[19] For, in such a structure, harsh and unsufferable criminal penalties are most likely to spring from devices that evade the rule of law or subvert the ordinary protections afforded by its regularity and generality.

Due Process of Law, too, insures against the imposition of criminal sanctions that are not decreed in strict accordance with the regular course of law.

> "[T]he terms 'due process of law' . . . come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the Crown and place him under the protection of the law. They were deemed to be equivalent to 'the law of the land.'" Dent v. West Virginia, 129 U. S. 114, 123 (1888).

16/ See Wheeler, Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment, 24 STAN L. REV. 838, 855-856 (1972).

17/ See Weems v. United States, 217 U. S. 359 (1909); Robinson v. California, 370 U. S. 660 (1962); Furman v. Georgia, 408 U. S. 238 (1972). And see note 15, supra.

18/ See section I(C), pp. 28-44, infra.

19/ This relationship is developed in Brief for Petitioner, Aikens v. California, 406 U. S. 813 (1972) [No. 68-5027], pp. 13-27, 39-56.

"The essence of [the] . . . principle of legality is limitation on penalization by the State's officials, effected by the prescription and application of specific rules.[20] So rudimentary has this principle been to American notions of Due Process, that unauthorized criminal penalties have rarely been imposed in this country;[21] but, on the rare occasions when they have been examined by this Court, the Court has treated them as self-evidently void to the extent that they exceeded what was authorized by valid legislation. Ex parte Lange, 83 U. S. 163 (1874); Ex parte Mills, 135 U. S. 263 (1890); In re Bonner, 151 U. S. 243 (1894). In this century, the root principle has been most commonly observed in its offshoots: the vagueness doctrine as applied to penalties, Giaccio v. Pennsylvania, 382 U. S. 399 (1966); the lenity principle, Ladner v. United States, 358 U. S. 169 (1958);[22] and this Court s

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20/ HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 28 (2d ed. 1960).

21/ But see Ashton v. Kentucky, 384 U. S. 195 (1966).

22/ "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication. [Citations omitted.] . . . 'When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.' . . . This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." Id. at 177-78.

adamant refusal to undertake either the judicial fashioning of criminal punishments, United States v. Evans, 333 U. S. 483 (1948), or the judicial fashioning of procedures for the imposition of criminal punishments, United States v. Jackson, 390 U. S. 570 (1968).[23/] Under the rule of law guaranteed by Due Process, the creation of criminal sanctions is, quite simply, "no part of [judges'] . . . duties." United States v. Reese, 92 U. S. 214, 221 (1875).

The question here is whether the North Carolina Supreme Court has infringed that principle, or whether the state-law characterization of what was done in Waddell as a mere application of severability doctrine saves palpable judicial promulgation of the harshest penalty known to mankind[24/] from the constitutional

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23/ "It is one thing to fill a minor gap in a statute -- to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality." Id. at 580.

24/ See the opinion of Mr. Justice Sharp, dissenting in State v. Waddell, 282 N.C. 431, ___, 194 S.E.2d 19, 48 (1973):

> "This Court, which has consistently deplored the encroachment of other courts upon the legislative prerogatives during the past decade, now follows suit and sets its own example of judicial overreaching by changing the penalty for rape, first degree murder, arson and first degree burglary 'from death or life imprisonment in the discretion of the jury to mandatory death.'"

charge of lawlessness. The question is not, of course, whether four or three Justices of the North Carolina Supreme Court more nearly guessed what the North Carolina legislature might have wanted in the wake of Furman, in light of the fact that its last pronouncement on the subject -- a quarter-century old -- was long sealed together with the irremediable fates of those who had been chosen to live or to die under the discretionary sentencing regime for which it then unmistakably opted.[25/] Rather the question is whether judicial fiat, with nothing more than the profession of that kind of guesswork to connect it with the regular and accepted method of providing by law for the punishment of crimes, can withstand scrutiny under federal constitutional guarantees designed as limitations upon the lawless exaction of overbearing and unauthorized criminal penalties.

25/ State v. Waddell, 282 N.C. 431, ____, 194 S.E. 2d 19, 26 (1973); State v. Mathis, 236 N.C. 508, 53 S.E.2d 666 (1949); and see note 12, supra.

C. The Perpetuation of Arbitrary Discretion in the Selection of Those Who Must Die.

The third issue presented is whether the capital trial procedure approved for North Carolina by the Waddell decision violates Furman's prohibition of arbitrary selectivity in the administration of the death penalty. Although the prevailing opinions in Furman differ somewhat regarding the questions left unanswered by the Furman holding, they all condemn at least any system of capital punishment in which some persons are chosen to live and others identically situated are consigned to die by irregular and erratic selective processes.[26] The form of those

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26/ The concurring Furman opinions of Mr. Justice Brennan (408 U.S. at 257-306) and Mr. Justice Marshall (408 U.S. at 314-374) shared the view that the death penalty is unconstitutional per se, regardless of the presence or absence of discretion in the procedural system whereby it is applied.

Mr. Justice Douglas did not reach the question "[w]hether a mandatory death penalty would . . . be constitutional," 408 U.S. at 257, but held the death sentences under review in Furman and companion cases unconstitutional under the Eighth and Fourteenth Amendments because they were the result of a procedure which discriminated against certain defendants upon the basis of "race, religion, wealth, social position [and] class" and which "[gave] room for the play of such prejudices." 408 U.S. at 242.

Mr. Justice Stewart found it "unnecessary to reach the ultimate question [whether "the infliction of the death penalty is constitutionally impermissible in all circumstances"], 408 U.S. at 306, since he found that the death sentences under review were "wantonly and . . . freakishly imposed," 408 U.S. at 310, and therefore in violation of the Eighth and Fourteenth Amendments. "[O]f all the people convicted of rapes and murders . . . , many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." 408 U.S. at 309-310 (footnote omitted).

Mr. Justice White declined to consider the question of whether "the death penalty is unconstitutional per se," 408 U.S. at 311, and held only that capital punishment was unconstitutional when it "is exacted with great infrequency even for the most atrocious crimes and . . . [when] there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U.S. at 313.

processes can hardly be thought constitutionally dispositive. See Commonwealth v. A Juvenile, 1973 Mass. Adv. Sh. 1199, 300 N.E.2d 434 (1973).[27] What is important is their result: a lawless and capricious dispensation of life and death, in which death sentences are "freakishly imposed." Furman v. Georgia, supra, at 310 (Mr. Justice Stewart, concurring).

In considering whether the Waddell procedures comply with Furman or whether the North Carolina Supreme Court has merely displaced the focus, lowered the visibility, diffused the responsibility, and thereby increased the predictable arbitrariness and discrimination of persisting discretionary processes for the administration of the death penalty,[28] this Court will

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27/ In this case, the Supreme Judicial Court of Massachusetts ruled that Furman invalidated a death sentence under a "mandatory" death penalty statute, if arbitrary procedures made it possible for some defendants to escape being subjected to the extreme punishment. The Court held that when a juvenile could be adjudicated either as an adult for rape-murder (in which case, the death sentence was "mandatory" under Mass. Gen. Laws Ann. c.265 §2) or as a juvenile (in which case no death sentence could be imposed), a death sentence imposed pursuant to the adult "mandatory" statute could not be affirmed, since Furman invalidated "discretionary imposition of the death sentence," 300 N.E. 2d at 442 (emphasis in original), regardless of where in the process this discretion was lodged.

28/ The discretion which is concealed but inevitable in a purportedly "mandatory" death-sentencing system is likely to be influenced by impermissible considerations to at least as great an extent as the visible discretion that Furman found unconstitutional. North Carolina's experience with a "mandatory" statute prior to 1949 reflects this point. Between 1910 and 1949, 75% of all persons received under sentence of death were non-white; between 1950 and 1972, 63% of those so received were non-white. Similarly, 80% of persons executed under the pre-1949 "mandatory" system were non-white; 73% of executions under the post-1949 "discretionary" system were of non-whites. (Data compiled from BEHRE, A BRIEF HISTORY OF CAPITAL PUNISHMENT IN NORTH CAROLINA, Tables 2 and 3, (North Carolina Office of Corrections, September

want to consider the following characteristics, among others, of North Carolina law and practice:

28/ cont'd.

1973)). It appears that under the "mandatory"system created by the Waddell decision similar forces are at work: as of June 1, 1974, 24 of the 34 defendants condemned to die for crimes committed between January 18, 1973 (the date of Waddell) and April 8, 1974 (the effective date of the new North Carolina capital punishment statute), or 71%, are non-white, approximately the percentage of those condemned to die who were non-white under the pre-Furman "mandatory" system. Death sentences have been affirmed or imposed under the Waddell procedures in the following cases:

State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Crowder, 285 N.C. 42, 203 S.E.2d 38 (1974); State v. Dillard, 285 N.C. 72, 203 S.E.2d 6 (1974); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974); State v. Poole, Moore County Superior Ct., No. 73-Cr-2710 (August 17, 1973), rev'd __ N.C. __ , 203 S.E. 2d 786 (April 10, 1974); State v. Monk, New Hanover County Superior Ct., No. 73-Cr-6476 (August 24, 1973); State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974); State v. Britt, Robeson County Superior Ct., No. 73-Cr-6567 (September 6, 1973), rev'd ___ N.C. ____, ___S.E.2d ___, N.C. Sup. Ct. No. 36 (Robeson) (May 15, 1974); State v. Spicer, New Hanover County Superior Ct., No. 73-Cr-8034 (September 12, 1973), rev'd ___ N.C. ___, ___S.E.2d ___, N.C. Sup. Ct. No. 25 (Hanover) (May 15, 1974); State v. Ward, Edgecombe County Superior Ct., No. 73-Cr-6706 (September 19, 1973); State v. Fowler, __ N.C. __ , 203 S.E.2d 803 (1974); State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974); State v. Bell, Robeson County Superior Ct., No. 73-Cr-12351 (October 18, 1973); State v. Sparks, Guilford County Superior Ct., No. 73-Cr-19776 (November 1, 1973); State v. Anthony Carey, Mecklenburg County Superior Ct., No. 73-Cr-46179 (November 8, 1973); State v. White, Alamance County Superior Ct., No. 73-Cr-12672 (December 6, 1973); State v. Brown, Edgecombe County Superior Ct., No. 72-Cr-7238 (December 9, 1973); State v. Hines, Edgecombe County Superior Ct., No. 73-Cr-7239 (December 9, 1973); State v. Walston, Edgecombe County Superior Ct., No. 73-Cr-7378 (December 9, 1973); State v. Albert Carey, Mecklenburg County Superior Ct., No. 73-Cr-6158 (December 11, 1973); State v. Vick, Beaufort County Superior Ct., No. 73-Cr-5687 (December 12, 1973); State v. Lampkins, Forsyth County Superior Ct., No. 73-Cr-43023 (January 19, 1974); State v. Pruitt, Cumberland County Superior Ct., Nos. 73-Cr-35545, 35546 and 35548 (January 29, 1974); State v. Williams, Wake County Superior Ct., No. 73-Cr-32521 (January 31, 1974); State v. Woods, Catawba County Superior Ct., Nos. 73-Cr-20546 and 20545 (January 28, 1974); State v. Patterson, Forsyth County Superior Ct., No. 73-Cr-22157 (February 5, 1974); State v. McCall, Transylvania County Superior Ct., Nos. 73-Cr-1828 and 1829 (February 9, 1974); State v. Avery, Bertie County Superior Ct., No. 74-Cr-2247 (February 17, 1974);

1. Prosecutorial Discretion.

In North Carolina, the Solicitor is charged with the duty to "prepare the trial dockets [and] prosecute in the name of the State all criminal actions requiring prosecution in the superior and district courts of his district," N.C. Gen. Stat. §7A-61 (1971 Cum. Supp.). He is thereby given broad and essentially unreviewable authority to initiate and terminate prosecutions, State v. Loesch, 237 N.C. 611, 75 S.E.2d 654, 656 (1953), including not only absolute discretion whether and what to charge, but also absolute discretion to bring an indicted defendant to trial upon lesser charges than those set forth in the indictment, State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971); and see State v. Roy, 233 N.C. 558, 64 S.E.2d 840 (1951). The North Carolina courts steadfastly refuse to review prosecutorial decisions. The leading case is State v. Casey, 159 N.C. 472, 74 S.E. 625 (1912), where an appellant, prosecuted and convicted for second degree murder by poisoning, argued that

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28/ cont'd.

State v. McLaughlin, Robeson County Superior Ct., Nos. 73-Cr-18024, 74-Cr-228, 74-Cr-229, 74-Cr-230, 74-Cr-231, 74-Cr-232 (February 28, 1974); State v. Burns, Onslow County Superior Ct., No. 74-Cr-1012 (March 1, 1974);

there was no evidence of this crime; that she was either guilty of first degree murder or not guilty of any offense. The Court rejected this contention, commenting that "if the solicitor erred, it is an error in favor of the prisoner, of which she cannot justly complain." 74 S.E. at 625. And the majority opinion in State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721, 742 (1974), flatly rejected the contention that either the Eighth or the Fourteenth Amendment required any limitation of the unfettered discretion of the Solicitor: "the Constitution of the United States does not require a state, in the enforcement of its criminal laws, so to hedge its prosecuting attorney about with 'guidelines' that he becomes a mere automaton, acting on the impulse of a computer and treating all persons accused of criminal conduct exactly alike."

Without any guidance whatsoever, then, a Solicitor is free to make the decision whether an indictment will be sought for first or second degree murder, for rape or assault to rape. He may thus "without violating [his] trust or any statutory policy . . . refuse to [seek] the death penalty no matter what the circumstances of the crime." Furman v. Georgia, supra, at 314 (Mr. Justice White concurring). This prosecutorial discretion doubtless accounts in considerable part for the striking fact, for example, that there have been only two convictions [29/] for

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29/ State v. Poole, Moore County Superior Ct., No. 73-Cr-2710 (August 17, 1973), rev'd ___ N.C. ___, 203 S.E.2d 786 (April 10, 1974). State v. Henderson, Alamance County Superior Ct., No. 73-Cr-7771 (September 5, 1973), aff'd 285 N.C. 1, 203 S.E.2d 10 (March 13, 1974), petition for cert. filed, June, 1974 (No. 73-). The petitioner in Henderson was also convicted and sentenced to die for the crime of rape.

first degree burglary during the past year of Waddell's implementation in a State where there were about forty convictions annually for this crime in the recent past,[30] and where 39,210 "burglaries and housebreakings" were reported in 1972.[31] The conclusion is inescapable that Solicitors have simply not regarded first degree burglary as a crime deserving death, and have not initiated first degree burglary prosecutions despite clear evidence of this crime.

A recent death penalty case, where the conviction and sentence were vacated and a new trial ordered because of procedural error, illustrates the Solicitor's charging discretion under the regime of Waddell. In State v. Spicer, N.C. Sup. Ct., No. 25 (New Hanover), decided May 15, 1974, two persons were tried and convicted for murder during the course of an armed robbery.[32] A third person, one Brailford, had helped plan the

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30/ In 1955, the North Carolina Department of Justice ceased keeping separate statistics for persons convicted of First Degree Burglary and Second Degree Burglary. The Biennial Report of the Attorney General, Vol. 32 at 515, reveals that in 1952, there were 4 convictions for First Degree Burglary (with 15 "Other Dispositions" of First Degree Burglary charges); in 1953, there were 33 convictions for this crime, with 10 "Other Dispositions," ibid.; in 1954, there were 35 convictions and 26 "Other Dispositions," ibid., Vol. 33 at 377.

31/ FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE, CRIME IN THE UNITED STATES 1972 (Aug. 1973) at 74. The FBI Uniform Crime Report statistics reflect reported crimes, not convictions, and the reported "burglaries and housebreakings" are not necessarily equivalent to the total number of statutory First Degree Burglaries which occurred in the State during 1972.

32/ The conviction of Isaac Monk, also found guilty of first degree murder and sentenced to death in this incident, is pending on appeal in the North Carolina Supreme Court. Monk v. State, New Hanover County Superior Ct., No. 73-Cr-6476 (August 24, 1973).

robbery and was to share in its proceeds, but he was not charged in the murder although his testimony "permitted the jury to make a finding that he was an accomplice either in the robbery or the murder, or both." Id., slip op. at 9. The Court thus described Brailford's role in the crime:

> "[T]he State's witness Brailford made the admission to the officers, 'I stated that I initiated the proposition concerning the hit of Christian Brothers Poultry. It was my idea.' He again stated that he expected his cut . . . . The evidence discloses that the witness Brailford originated the plan to rob his employer and explained the setup at the plant."

Id., supra, at 10-11.

2. Plea Bargaining.

Under the Waddell procedures, there is no limit on the power of a Solicitor to accept a plea of guilty to a lesser included offense by a defendant charged with a capital crime, or to nol pros a capital indictment entirely. It is unclear how much plea bargaining in capital cases occurs in North Carolina,[33/] but the critical point is that it is utterly unregulated: the discretion of a Solicitor to accept a plea to a lesser offense in a capital case being quite as untrammelled as the freedom of a jury to recommend mercy in a pre-Waddell capital case. One instance of that discretion is State v. Wiggins, Bertie County Superior Ct., No. 73-Cr-2383, in which a 14 year old defendant was indicted for the rape of a nine year old girl, a potentially capital offense. On February 19, 1974, the defendant was permitted to enter a guilty plea to charges of assault with intent to rape and of assault with intent to kill, and received sentences of fifteen years and five years.

33/ Guilty pleas are said to account for up to 90% of all criminal convictions in the United States. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

Such cases doubtless reflect the long-recognized function of plea bargaining under a purportedly "mandatory" sentencing statute: it "provides the opportunity to individualize justice . . . . Certain mandatory provisions of the statutes which in a particular situation seem unduly harsh may be avoided and a punishment selected which is best suited to the defendant who has already acknowledged his guilt."[34/]

34/ Heath, "Plea Bargaining -- Justice Off the Record," 9 WASHBURN U.L. REV. 430, 455 (1970).

3. Jury Discretion

Even when a North Carolina jury has no admitted sentencing discretion, it still retains power to spare a capital defendant's life by finding him guilty of a lesser included offense. If there is any evidence to support the finding of such an offense, a defendant may demand a lesser-included-offense instruction as a matter of right.[35] N.C. Gen. Stat. §15-170 provides that:

> "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of any attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime . . . ."

35/ "If . . .there is any evidence, or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial court under appropriate instructions to submit that view to the jury." State v. Knight, 284 N.C. 384, 391, 103 S.E.2d 452, 456 (1958) (quoting State v. Spivey, 152 N. C. 676, 686, 65 S.E. 995, 999 (1909)); State v. Childress, 228 N.C. 208, 45 S.E.2d 42 (1947). If there is no evidence at all that a defendant was guilty of a lesser included offense, a defendant may not be able to demand such a charge as a matter of right, State v. Hicks, 241 N.C. 156, 84 S.E.2d 545, 547 (1954); State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971); State v. Roseman, 279 N.C. 573, 184 S.E.2d 289 (1971); State v. Griffin, 280 N.C. 142, 185 S.E.2d 149 (1971); State v. Brown, 227 N.C. 383, 42 S.E.2d 402, 404 (1947); State v. Cox, 201 N.C. 357, 160 S.E. 358, 360 (1931), and a trial judge has discretion to charge that a defendant is either guilty of the capital crime or not guilty of any crime. State v. Mays, 225 N.C. 486, 35 S.E.2d 494 (1945); State v. Scales, 242 N.C. 400, 87 S.E.2d 916 (1955); State v. Hairston, 280 N.C. 220, 185 S.E.2d 633, 642-643 (1972); State v. Beard, 207 N.C. 673, 178 S.E. 242 (1935); State v. Satterfield, 207 N.C. 118, 176 S.E. 466 (1934). However, if such a charge is given and if a defendant is convicted of the lesser included offense, the conviction will nevertheless be affirmed on appeal, even if it appears irrational on the facts of the case. See State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906), and discussion, infra.

And N.C. Gen. Stat. § 15-169 provides that:

> "[o]n the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such a finding . . . ."

The right to a lesser-included-offense charged is considered so important in North Carolina that its omission is held to be reversible error even when the defendant fails to request such a charge. State v. Wagoner, 249 N.C. 637, 107 S.E.2d 63 (1959); State v. Riera, 276 N.C. 361, 172 S.E.2d 535 (1970). See State v. Moore, 275 N.C. 198, 166 S.E.2d 652, 661 (1969); State v. DeGraffenreid, 223 N.C. 461, 27 S.E.2d 130, 132 (1943). The Supreme Court of North Carolina has frequently reversed convictions for capital offenses[36/] because the trial court failed to give a charge on second degree murder,[37/] voluntary

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36/ The rule in North Carolina is that "the judge's failure to submit the question of defendant's guilt of the lesser included offense is not cured by a verdict convicting the defendant of the highest offense charged in the bill," State v. Joe Freeman, 275 N.C. 662, 170 S.E.2d 461, 465 (1969).

37/ State v. Newsome, 195 N.C. 552, 143 S.E. 187 (1928); State v. Perry, 209 N.C. 604, 184 S.E. 545 (1936); State v. Gause, 227 N.C. 26, 40 S.E.2d 463 (1946); State v. Knight, 284 N.C. 384, 103 S.E.2d 452 (1958). When the State attempts to prove "Willful, deliberate and premeditated killing," N.C. Gen. Stat. § 14-17, which did not occur during the course of a felony and was not committed by poison or lying in wait, the jury may decline to return a first degree verdict and convict instead for second degree murder, since "the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first degree or second degree," N.C. Gen. Stat. § 15-172, and since "the jury alone may determine whether an intentional killing has been established where no judicial admission of the fact is made by the defendant." State v. Todd, 264 N.C. 524, 529, 142 S.E.2d 154, 158 (1965). See also, State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970).

manslaughter,[38] or involuntary manslaughter[39] in first degree murder cases, or because it failed to charge on assault with intent to rape in rape cases.[40]

Moreover, a jury may be charged on a lesser included offense where there is no evidence to support such a charge, and a conviction for the lesser offense will be sustained on appeal.[41]

38/ State v. Merrick, 171 N.C. 788, 88 S.E. 501 (1916); State v. Robinson, 188 N.C. 784, 125 S.E. 617 (1924); State v. Manning, 251 N.C. 1, 110 S.E.2d 474 (1959). Cf. State v. Joe Freeman, 275 N.C. 662, 170 S.E.2d 461 (1969).

39/ State v. Wrenn, 279 N.C. 676, 185 S.E.2d 129 (1971). Cf. State v. Denny Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972); State v. Joe Freeman, 275 N.C. 662, 170 S.E.2d 461, 465 (1969).

40/ State v. Williams, 185 N.C. 685, 116 S.E. 736 (1923). See also, State v. Green, 246 N.C. 717, 100 S.E.2d 52 (1957); State v. Roy, 233 N.C. 558, 64 S.E.2d 840 (1951); State v. Jones, 249 N.C. 134, 105 S.E.2d 513 (1958); State v. Webb, 20 N.C. App. 199, 200 S.E.2d 840 (1973). Cf. State v. Bryant, 280 N.C. 551, 187 S.E.2d 111, 116-118 (1972) (Bobbitt, CJ, dissenting). "An assault with intent to commit rape is a lesser degree of the felony and crime of rape. It is well settled with us that an indictment for rape includes an assault with intent to commit rape." State v. Green, 246 N.C. 717, 100 S.E.2d 52, 54 (1957).

41/ The Supreme Court of North Carolina has occasionally disapproved of this practice, State v. Bryant, 280 N.C. 551, 187 S.E.2d 111, 114 (1972); State v. Allen, 279 N.C. 115, 181 S.E.2d 453, 457 (1971); State v. Bentley, 223 N.C. 563, 27 S.E.2d 738, 741 (1943), but it has never reversed a conviction of a lesser included offense on the ground that there was no evidence to justify submitting such an offense to the jury.

State v. Robertson, 210 N.C. 266, 186 S.E. 247 (1936); State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970); State v. Bryson, 173 N.C. 803, 92 S.E. 698 (1917). In State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906), for example, the appellant, who had been convicted of second degree murder, claimed that an indictment for murder by poisoning necessarily implied that he was either guilty of first degree murder or innocent of any crime. The Court affirmed, stating that such a conviction was within the power of the jury, 55 S.E. at 343, and that "whatever the reasoning of the jury, the prisoner has no cause to complain that he was not convicted of the higher offense." 55 S.E. at 344. In State v. Quick, 150 N.C. 820, 64 S.E. 168, 170 (1909), the Court held that the giving of a manslaughter charge in a first degree murder case had been proper:

> "Suppose the court erroneously submitted to the jury a view of the case not supported by evidence whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder, what right has the defendant to complain? It is an error prejudicial to the state, and not to him." 42/

42/ "An error on the side of mercy is not reversible . . . ." State v. Fowler, 151 N.C. 731, 66 S.E. 567 (1909). Accord: State v. Rowe, 155 N.C. 436, 71 S.E. 332, 337 (1911). See also State v. Ratcliff, 199 N.C. 9, 153 S.E. 605, 606 (1930); State v. Johnson, 218 N.C. 604, 12 S.E.2d 278, 288 (1940); State v. Vestal, 283 N.C. 249, 195 S.E.2d 297, 299-300 (1973); State v. Hall, 214 N.C. 639, 200 S.E. 375 (1939).

In State v. Bentley, 223 N.C. 563, 27 S.E.2d 738, 740 (1943), the Court declared:

> "If we are to understand the appellant to base his demand for discharge merely on the fact that the jury by an act of grace has found him guilty of a minor offense, of which there is no evidence, instead of the more serious offense charged, this is to look a gift horse in the mouth; more especially, since the conclusion that there is no evidence must be reached by conceding that all the evidence, including the admission of the defendant, points to a graver crime. Such verdicts occur now and then . . . [and] [w]hen they do, although illogical or even incongruous, since they are favorable to the accused, it is settled law that they will not be disturbed."

To insure that the jury is aware of the consequences of its decision in a capital case, the Supreme Court of North Carolina recently ruled that if "the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence . . . sufficient compelling reason exists to justify . . . informing the jury of the consequences of their possible verdicts." State v. Britt, N.C.Sup.Ct., No. 36 (Robeson), decided May 15, 1974, [Appendix D, infra] slip op. at 16. The Court also ruled that "[c]ounsel may, in his argument to the jury, in any cse, read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged . . . .[He may] in his argument to the jury . . . . inform or remind the jury that the death penalty must be imposed in the event it should return a verdict of guilty upon a capital charge." Id. at 17-18. This holding implements the power of the jury to avoid imposing the death penalty in a

sympathetic case, either by convicting of a lesser included offense or by returning a verdict of not guilty.[43/] Thus, under North Carolina law, a double level of discretion may affect the jury's choice of a life or death verdict in a case where all the evidence points to guilt of a capital offense or of nothing: the trial judge has discretion to submit such lesser offenses, and the jury has discretion to commit for them.

43/ Wicker, "Christmas on the New Death Row," New York Times, Dec. 25, 1973, p. 18, col. 1:

> "Raleigh, N.C. Dec. 24 . . . In January, 1973, the North Carolina Supreme Court ruled that the Federal Supreme Court had made it unconstitutional for a jury to recommend mercy, hence life imprisonment rather than death, for an arbitrary number of those convicted of first-degree murder, arson, rape or burglary; . . . Around here, some are still heaving sighs of relief at the case of a black man charged with breaking into a house and stealing about $10 worth of food. The house was occupied, the break-in occurred at night, so the offense was first-degree burglary. Perhaps influenced by the only alternative available, the jury acquitted him, thus sparing him Christmas on the new Death Row but raising the question how mandatory death sentences can be considered an improvement on cruel and unusual punishment."

4. Executive Clemency.

The North Carolina Constitution provides that:

> [T]he Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons. Article III, §5(6).

Governors of the State have, by the exercise of this clemency power, spared the lives of a substantial proportion of condemned prisoners. Between 1903 and 1963, the sentences of two hundred thirty-five (235) of three hundred fifty-eight (358) condemned prisoners were commuted. The chief executive has thereby commuted 65.6 percent of the death sentences imposed in the State over a sixty year period.

The Governor's discretion to spare the lives of condemned felons is absolute. The Constitution reserves to the legislature the right to prescribe the "manner of applying for pardons" but leaves the grant or denial subject only to "such conditions as [the Governor] may think proper." Indeed, the Court of Appeals has said with regard to the analogous executive power to grant paroles (a power originally conferred upon the Governor by Article III) that:

> [i]n a matter which historically, in this State at least, has been considered a function of the executive branch and which by its nature involves a large number of intangibles, rigid guide lines are neither necessary nor desirable. Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, 792 (1971).

Under a procedural system in which the death penalty is purportedly "mandatory," the clemency authority has commonly functioned as the aspect of the criminal jutice system that responds to "mitigating factors" -- factors which, while insufficient to justify a verdict of not guilty, are nevertheless viewed by society as meriting some mercy in the exaction of punishment.[44/] A 1957 study of the imposition of capital punishment in North Carolina noted a pronounced decline in the number of commutations or death sentences after the 1947 and 1949 statutory amendments giving juries the option of imposing life sentences for the four crimes which had theretofore carried mandatory death penalties.[45/] By withdrawing that option from juries in 1973, the Waddell decision obviously displaced, but equally obviously did not reduce, the operation of discretionary selectivity in North Carolina's death-sentencing practices.

44/ Note, Executive Clemency in Capital Cases, 39 N.Y.U.L.REV. 136, 165-166 (1964).

45/ Johnson, Selective Factors in Capital Punishment, 36 SOCIAL FORCES, 165, 166-7 (1957). Behre notes that while 64 percent of condemned persons escaped execution between 1910 and 1948, the percentage of those escaping execution dropped to 38 percent for the period between 1949 and 1962. Undoubtedly, a large proportion of condemned persons who avoided the death penalty did so by commutation. BEHRE, A BRIEF HISTORY OF CAPITAL PUNISHMENT IN NORTH CAROLINA, Tables 2 and 3. (North Carolina Office of Corrections, September 1973).

D. The Inconsistency Of The Death Penalty With Contemporary Standards of Decency

Eighth Amendment standards are not static, and the prohibitions of the cruel-and-unusual punishment clause are not "confine[d] . . . to such penalties and punishments as were inflicted by the Stuarts." Weems v. United States, 217 U. S. 349, 372 (1910). Instead, the clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice," Id. at 378, and informed by "the light of contemporary human knowledge." Robinson v. California, 370 U. S. 660, 666 (1962). There was no disagreement among the Justices who reached the issue in Furman v. Georgia that this evolutionary standard authorized the periodic Eighth Amendment re-evaluation of hoary criminal punishments. See Furman v. Georgia, supra, at 242 (opinion of Mr. Justice Douglas); at 264-269 (opinion of Mr. Justice Brennan); at 325-328 (opinion of Mr. Justice Marshall); at 383 (opinion of Mr. Chief Justice Burger); at 409 (opinion of Mr. Justice Blackmun); at 429 (opinion of Mr. Justice Powell). Such a re-evaluation of the penalty of death is particularly appropriate at this historical juncture, for three principal reasons:

First: The cruelty and inutility of the death penalty are apparent in an age when "contemporary human knowledge," draws upon advanced medical science and sciences of human behavior. We are no longer so uninformed about the complex sources and motivations of anti-social behavior as to maintain the simplistic and beguiling notion that the threat of death deters serious crime; nor can we ignore today the the truism that government remains "the potent, the omnipresent teacher" 46/ even when it chooses to

46/ Olmstead v. United States, 277 U. S. 438, 485 (1928) Justice Brandeis, dissenting).

teach the overriding lesson of capital punishment "'that a man's life ceases to be sacred when it is thought useful to kill him.'"[47] While we have not abandoned the essential moral and social proposition that the citizen is responsible to society for his or her conduct, new knowledge of the subtle springs of human behavior has led to a reconsideration of the justifications for retributive punishments,[48] a partial diminution of retributive sentiment, and a guarded, but increased optimism about the possibilities of rehabilitation. At the same time, society has developed sophisticated means for safely isolating dangerous criminal offenders.

To the extent that contemporary human knowledge casts doubt on the utility of capital punishment in achieving the legitimate aims of criminal sanctions, it casts doubt on the legitimacy of capital punishment in Eighth Amendment terms. If it cannot be established that the death penalty is a superior deterrent, and if it cannot be shown that the death penalty is necessary to isolate dangerous offenders, reinforce moral standards of (if retribution

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47/ Camus, Reflections on the Guillotine, in CAMUS, RESISTANCE, REBELLION AND DEATH 173, 229 (1961).

48/ ". . . a cloud of doubt has settled over the keystone of 'retributive' theory. Its advocates can no longer speak with the old confidence that statements of the form 'This man who has broken a law, could have kept it' had a univocal or agreed meaning; or where scepticism does not attach to the meaning of this form of statement, it has shaken the confidence that we are generally able to distinguish the cases where a statement of this form is true from those where it is not." H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY (1968), at 1.

is considered a legitimate aim of penal sanctions) a civilized society's measure of justice, then it is surely impossible for any governmental organ to justify the decision made below by a single vote of the North Carolina Supreme Court: to "extinguish, after untellable suffering, the most mysterious and wonderful thing we know, human life."[49] Mr. Justice White wrote in Furman that:

> "The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment." 408 U. S. at 312.

At a time when the death penalty is and inevitably will continue to be rarely imposed, and when empirical data fail to substantiate that its imposition is "of substantial service to criminal justice" (id. at 313) in any case, the question is squarely presented whether death as a punishment for crime is consistent with any morality that our society can forthrightly accept.

Second: The rarity with which the death penalty is imposed today signifies repudiation of its regular use. The Court in Furman confronted an accepted system which sent an exceedingly small number of persons[50]--who were, for the most part, members of

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49/ Black, Crisis in Capital Punishment, 31 MD. L. REV. 289, 291 (1971).

50/ "The most salient characteristic of capital punishment is that it is infrequently applied . . . [A]ll available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND

powerless or despised minorities--to die in secret for crimes punished less severely in the vast majority of cases.[51]

> "[T]oday society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute." Furman v. Georgia, supra, at 300 (Brennan, J. concurring).

The Furman majority rightfully looked to what the public conscience will allow the law to do, as opposed to what it will permit the law to threaten. In the words of Mr. Justice Brennan, "The objective indicator of society's view of an unusually severe punishment is what society does with it." 408 U. S. at 300 (emphasis added). A punishment which is tolerated only because it is rarely imposed, or because the facts and circumstances surrounding its imposition and the evidence of its inutility are generally unknown, or because it is imposed only upon the powerless and members of outcast groups, is not a punishment consistent with contemporary morality. Even in those states which have enacted new capital punishment legislation since Furman, the imposition of the

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50/ (Cont'd)
ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967), p. 143.
The extent to which this is true appears upon inspection of the highly reliable figures on executions maintained by the Federal Bureau of Prisons since 1930. Of the 3,859 persons executed under civil authority in the United States between 1930 and 1968, only 191 were executed during the 1960's and only 25 were executed after 1963. No one has been executed in the United States since 1967. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 46, Capital Punishment 1930-1970 (August 1970).

51/ Justice Douglas quoted the conclusion of the President's Commission on Law Enforcement and Administration of Justice that "'the death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.'" Furman, supra, at p. 249. See also the concurring opinions of Justice Stewart, at p. 310, and Justice Marshall, at pp. 364-366. Justice Marshall noted that "American citizens know almost nothing about capital punishment." Indeed, ignorance of the details of execution is insured by law in that every American jurisdiction now

death penalty remains, and must continue to remain, a freakishly rare occurrence. Indeed, even in the State of North Carolina, where for fourteen months a purportedly "mandatory" death sentence was put into effect for four relatively common crimes, the number of death sentences was so low that it is impossible to conclude that the penalty was being in a fraction of the cases to which it was theoretically applicable. The legitimacy of its application in a manner which no honest mind can doubt will continue to be freakishly rare in this country--if it continues at all--is therefore called into question.

Third: The growing reluctance to allow the state to take the life of any human being and the absolute refusal to require or tolerate general application of the death penalty reflect not only an increased awareness of the inutility of the punishment, but also a moral development which has produced an increased respect for life and a concommittant revulsion against inflicting the physical and psychological torture of condemnation, inevitably lengthy death row confinement and execution.[52] Increased respect for

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51/ (Cont'd)

forbids public executions. Movements to Abolish the Death Penalty in the United States, 284 ANNALS 124, 127-130 (1952).

52/ ". . . the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries." SELLIN, THE DEATH PENALTY (1959) 15.

life and increased respect for the dignity of man inevitably increase the awesomeness of the notion of condemnation and execution. Thus executions, which were once routine occurrences, had ceased for a period of five years even prior to Furman as this nation agonized over the prospect of their resumption and over the inevitable and sobering possibility that human error or a denial of due process could send a man to his death.[53/]

The enormity of the process forbids its resumption without the prior judgment of this Court. If, after a lapse of seven years, the United States is going to return to killing people, this Court should first consider under the relevant Eighth Amendment standards all that that implies.

It is incontrovertible that an impending execution inflicts severe psychological anguish and mental pain upon a condemned man.

Under a legal system which postpones execution for periods measured in years in an attempt to assure its conformity with due process of law, the wait between the imposition of sentence and the actual infliction of death exacts a severe toll.

As the California Supreme Court has pointed out,"the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." People v. Anderson, 6 Cal.3d 628, 493 P.2d 880, 894 (1972).

53/ See Black, "The Crisis in Capital Punishment" 31 MD. L. REV. 290, at 295-300 (1971).

The condemned prisoner, even more than the expatriate, is subjected to the "fate of ever-increasing fear and distress." Trop v. Dulles, 356 U. S. 86, 102 (1958) (plurality opinion of Chief Justice Warren). The stress of awaiting execution frequently produces insanity, see Solesbee v. Balkom, 339 U. S. 9, 14 (1950) (Justice Frankfurter, dissenting), or other extreme manifestations of psychological compensation.

Moreover, existing data suggests what imagination intuits: there is likely to be unmeasurable physical pain before consciousness is lost. "Although our information is inconclusive, it appears that there is no method available that guarantees an immediate and painless death." Furman v. Georgia, supra, at 287 (Mr. Justice Brennan concurring).

And there is, finally the enormity and irreversibility of the act of condemning and terminating a human existence -- an act which denies absolutely the very thing which the Eighth Amendment was created to protect: the dignity of man.

The moral development which has accompanied advances in understanding of the causes and control of crime and which is reflected in the increasing world-wide disinclination to impose the punishment of death calls upon this Court now to consider the question of the legitimacy of that punishment under the Eighth Amendment's measure: "the evolving standards of decency that mark the progress of a maturing society."[54/]

54/ Trop v. Dulles, 356 U. S. 86, 100 (1958) (plurality opinion of Chief Justice Warren).